

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

LOARCA V. CARGILL MEAT SOLUTIONS

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JOSEFINA LOARCA, APPELLANT,
V.
CARGILL MEAT SOLUTIONS CORP., APPELLEE.

Filed August 21, 2012. No. A-12-137.

Appeal from the Workers' Compensation Court. Affirmed.

Charles E. Dorwart, P.C., L.L.O., for appellant.

Jenny L Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Josefina Loarca appeals an order of the Nebraska Workers' Compensation Court in which the court found that Loarca had suffered a permanent partial disability, found that she had achieved maximum medical improvement, and denied her request for vocational rehabilitation. On appeal, Loarca challenges the court's finding concerning the appropriate date of maximum medical improvement, the court's finding that she was not permanently totally disabled under the odd-lot doctrine, and the court's denial of vocational rehabilitation. We find no merit to the assertions on appeal, and we affirm.

II. BACKGROUND

1. INJURY AND MEDICAL BACKGROUND

As the compensation court found, the factual background of this case is largely undisputed. On July 31, 2008, Loarca was injured in the course and scope of her employment with Cargill Meat Solutions Corp. (Cargill) when she suffered an injury to her left shoulder. Loarca initially underwent some therapy, but not formal physical therapy, and treated the pain

with ibuprofen. In September, she was prescribed prescription strength anti-inflammatory medication and referred to formal physical therapy. She continued working, performing light-duty restricted work.

In March 2009, Loarca was diagnosed as having suffered a stroke and suffering from a heart condition. It is undisputed that the stroke and heart condition were unrelated to her employment. During her treatment for the stroke and heart condition, Loarca presented a number of notes to Cargill excusing her from appearing at work. She presented a series of notes excusing her from work through March 17. The record indicates that Cargill received the last of these notes on March 14, excusing her from work until March 17. Another note, dated March 20, 2009, and excusing Loarca from work "beginning [March 17] until indefinitely," was also sent to Cargill. The record indicates that this note was not received by Cargill until March 25.

Sarah Heller-Glen, Cargill's human resources manager, testified that Cargill had an attendance policy. She testified that if an employee did not appear for work or call Cargill about the absence, the absence would be recorded as an "unexcused absence," and that three unexcused absences would be grounds for termination of employment. She testified that, based on the note received on March 14, 2009, Cargill expected Loarca to return to work on March 18. She testified that Loarca, however, did not appear for work or call Cargill and that Cargill did not receive any communication until the note received on March 25. By the time that note was received, Loarca had already failed to appear for work or call Cargill for more than 3 days. As a result, Cargill notified Loarca on April 8 that her employment was terminated for violation of the attendance policy.

In June 2010, Loarca underwent surgery on her shoulder. After her surgery, Loarca's doctor issued various light-duty restrictions. In August, her doctor made conflicting findings, first indicating that Loarca could work in a "sedentary capacity" and then indicating that Loarca should not work until after an evaluation to be held in 6 weeks.

In October 2010, Loarca's doctor estimated that she would not reach maximum medical improvement for another "three to six months" and indicated that Loarca could perform sedentary or very light-duty work.

In September 2011, Loarca was seen by another doctor for a defense medical examination. That doctor concluded that Loarca had reached maximum medical improvement in September 2010. He opined that 3 months of postoperative physical therapy should have been "more than adequate given the nature of [Loarca's] underlying shoulder condition."

On November 17, 2011, Loarca's doctor indicated in office notes that he felt medical providers had "done just about everything we can do for her" and that he was "placing [Loarca] at maximum medical improvement." On December 22, he examined Loarca again and indicated in his office notes that "[a]t this point she is at maximum medical improvement and has been since December 2010." He indicated at that time that Loarca had suffered a 5-percent permanent upper body impairment and opined that if Loarca "was otherwise healthy she should be able to return to a labor type job at Cargill . . . as long as she kept her activities at or below shoulder level."

2. PROCEDURAL BACKGROUND

In May 2011, Loarca filed a petition in the compensation court. Loarca acknowledged that Cargill had paid medical bills related to the injury and her treatment of the injury. Cargill answered, acknowledging that Loarca suffered a work-related injury, but denying that Loarca suffered permanent disability.

In January 2012, the compensation court entered its award. The specific issues addressed at trial and resolved in the court's award included the period of temporary disability and the date of maximum medical improvement, the extent of any permanent disability, the entitlement to future medical benefits, and the entitlement to vocational rehabilitation.

The compensation court found that Cargill lacked credibility concerning evidence adduced that it could and would have attempted to accommodate Loarca if her employment had not been terminated for violating the attendance policy and found that Loarca was entitled to temporary disability benefits even after her employment had been terminated by Cargill. The court recognized that there were multiple opinions concerning the date of maximum medical improvement, but ultimately accepted the opinion of her treating doctor that she reached maximum medical improvement in December 2010.

The court also accepted Loarca's treating doctor's opinion that she had suffered a 5-percent permanent partial disability to her left upper extremity and awarded benefits accordingly. The court also awarded future medical benefits "reasonably necessary to relieve [Loarca] from the effects of the work-related injury."

On the subject of vocational rehabilitation, the court again questioned the credibility of Cargill's witnesses and evidence suggesting that it could and would have accommodated Loarca and provided employment for which she was suited had her employment not been terminated for violation of the attendance policy. The court went so far as to suggest that Cargill "seize[d] upon a relatively minor employment infraction and terminate[d] [Loarca's employment] in retaliation for filing a workers' compensation claim." The court suggested that Loarca might be able to entertain a civil suit for retaliatory discharge, but concluded that it lacked jurisdiction to adjudicate a retaliatory discharge claim. The court then concluded that "[t]he evidence as a whole indicated [Loarca] could have returned to gainful employment in a light duty position with the same employer" and concluded that Loarca had "not met her burden to show entitlement to vocational rehabilitation services."

This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Loarca has assigned three errors. First, Loarca asserts that the compensation court erred in its determination of the date of maximum medical improvement. Second, Loarca asserts that the court erred in not finding that she was permanently totally disabled under the odd-lot doctrine. Third, Loarca asserts that the court erred in not awarding vocational rehabilitation benefits.

IV. ANALYSIS

Loarca challenges the findings of the compensation court concerning maximum medical improvement, permanent total disability, and vocational rehabilitation. We find no merit to Loarca's assertions on these issues.

A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Parks v. Marsden Bldg. Maintenance*, 19 Neb. App. 762, 811 N.W.2d 306 (2012). In determining whether to affirm, modify, reverse, or set aside a judgment of the compensation court, an appellate court will not disturb the findings of fact of the trial judge unless clearly wrong. See *id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

1. MAXIMUM MEDICAL IMPROVEMENT

Loarca first challenges the compensation court's finding concerning the date she reached maximum medical improvement. She asserts that the court erred in not accepting her treating doctor's initial determination that maximum medical improvement was reached in November 2011 and, instead, accepting her treating doctor's subsequent determination that she had reached maximum medical improvement in December 2010. We do not find the compensation court's factual determination in this regard to be clearly wrong.

The date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical recovery from the injuries sustained in a particular compensable accident. *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008). A claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing. *Id.*

Generally, the determination of maximum medical improvement is a question of fact. See *id.* Upon appellate review, the findings of fact made by the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Straub v. City of Scottsbluff*, 280 Neb. 163, 784 N.W.2d 886 (2010). In testing the sufficiency of the evidence to support the findings of fact by the compensation court, the evidence must be construed in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Id.*

In this case, Loarca's treating doctor presented different opinions concerning maximum medical improvement. He initially opined in October 2010 that she would not reach maximum medical improvement for another 3 to 6 months. In November 2011, he indicated that she was at maximum medical improvement. Then, in December 2011, he indicated that she was at maximum medical improvement and had been since December 2010. A defense examiner opined that she was at maximum medical improvement in September 2010. Neither doctor testified.

The compensation court made a factual determination that Loarca's treating doctor's final opinion was the correct date for determining maximum medical improvement. Loarca has not demonstrated or argued how her condition changed or improved in between December 2010 and November 2011. We do not find the compensation court's conclusion, supported by the written opinion of Loarca's treating doctor, to be clearly wrong.

2. PERMANENT TOTAL DISABILITY

Loarca next asserts that the compensation court erred in not finding her to be permanently totally disabled under the odd-lot doctrine. We find no merit to this assertion, and the compensation court was not clearly wrong in rejecting it.

Total disability in the context of workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Meredith v. Schwarck Quarries*, 13 Neb. App. 765, 701 N.W.2d 387 (2005). An employee who is injured to the extent that the employee cannot perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for the services is nonexistent may be classified as totally disabled. *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). Whether an injured worker is totally disabled is a question of fact which may be reversed upon appeal only if the compensation court was clearly wrong in its determination. *Brummer v. Vickers, Inc.*, 11 Neb. App. 691, 659 N.W.2d 838 (2003).

Under the odd-lot doctrine, total disability may be found where a worker who, while not altogether incapacitated for work, is so handicapped that he or she will not be employed regularly in any well-known branch of the labor market. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012); *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008). The essence of the test is the probable dependability with which the worker can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. *Id.*

The record in the present case indicates that Loarca suffered a single member injury to her left shoulder. See *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008) (permanent total disability benefits not generally available for single scheduled member injury absent unusual or extraordinary condition as to other members or parts of body). Her treating doctor specifically concluded that she was not totally disabled and that the injury to the shoulder was actually "fairly minor." He specifically indicated that her only permanent restriction was no prolonged overhead use of her left shoulder and that she could return to work with Cargill.

Cargill also adduced evidence that it could have returned Loarca to employment that would have been suitable work for which she had previous training or experience. Cargill adduced evidence that it could have placed Loarca into an accommodated position. Although the compensation court questioned the credibility of Cargill's witnesses and evidence on the subject of whether Loarca's employment was terminated pursuant to the attendance policy instead of as retaliation for bringing a workers' compensation claim, and although the compensation court did not appear to believe that the reason Cargill did not actually try to accommodate Loarca was

because of the attendance policy violation, the court did specifically find that “[t]he evidence as a whole indicated [Loarca] could have returned to gainful employment in a light duty position with [Cargill].” The record supports this conclusion, and the compensation court’s finding was not clearly wrong. The compensation court did not err in failing to find Loarca permanently totally disabled under the odd-lot doctrine.

3. VOCATIONAL REHABILITATION

Finally, Loarca asserts that the compensation court erred in finding that she was not entitled to vocational rehabilitation. Loarca asserts that the compensation court found it was without jurisdiction to award such benefits. We disagree with Loarca’s characterization of the compensation court’s finding, and we find no merit to the assertion that the court erred in failing to award vocational rehabilitation.

When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she is entitled to vocational rehabilitation services. *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009). See Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010). Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court. *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008). The purpose of vocational rehabilitation under workers’ compensation is to restore an injured employee to suitable gainful employment. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005); *Visoso v. Cargill Meat Solutions*, *supra*. See, also, § 48-162.01(3). A determination regarding an employee’s entitlement to vocational rehabilitation is made at the time of maximum medical improvement. *Visoso v. Cargill Meat Solutions*, *supra*. See *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). As § 48-162.01(3) indicates, if one is able to return to work, he or she is not entitled to vocational rehabilitation. *Visoso v. Cargill Meat Solutions*, *supra*.

Loarca argues that the compensation court found that her claim for vocational rehabilitation was linked to a retaliatory discharge claim and that it lacked jurisdiction to resolve her request for vocational rehabilitation. We think this misconstrues the compensation court’s findings. Rather, the compensation court--perhaps inappropriately--included findings suggesting that Loarca may have a viable retaliatory discharge claim against Cargill and questioning whether the termination of her employment was for a violation of the attendance policy or as retaliation for filing a compensation claim. The court then found that it lacked jurisdiction to consider such a tort claim for retaliatory discharge. The court then also made a specific finding that the evidence as a whole indicated that Loarca could have returned to gainful employment with Cargill and found that Loarca failed to meet her burden to show an entitlement to vocational rehabilitation benefits. As noted above, there was support in the record for this conclusion and it was not clearly wrong.

V. CONCLUSION

We find no merit to Loarca’s assertions on appeal. The compensation court was not clearly wrong in its determinations concerning maximum medical improvement, permanent total disability, or vocational rehabilitation. We affirm.

AFFIRMED.